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3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 Upmann Sanchez Turf and Landscape,
7 Inc. dba US Turf,

8 Plaintiff,

9 v.

10 US TURF, LLC dba Serenity Landscaping,

11 Defendant.

12 And related counterclaims.

Case No. 2:21-cv-01749-JCM-DJA

Order

13 This is a trademark infringement case arising out of Plaintiff Upmann Sanchez Turf and
14 Landscape, Inc. dba US Turf and Defendant US TURF, LLC dba Serenity Landscaping's use of a
15 similar name. Plaintiff sues Defendant for damages and injunctive relief, alleging that Defendant
16 infringed on its trademark of the name. Defendant counterclaims for damages, declaratory relief
17 that it is not infringing, and injunctive relief canceling or modifying Plaintiff's trademark
18 registration.

19 Defendant moves to strike one of Plaintiff's expert witness reports, arguing that Plaintiff
20 has attempted to introduce an untimely initial expert report alongside its rebuttal expert report.
21 (ECF No. 34). Both Defendant and Plaintiff move to seal exhibits and portions of their motions.
22 (ECF Nos. 43, 46, 53, 55). Because the Court finds that Plaintiff's report is untimely, but that
23 Plaintiff has not demonstrated harmlessness or substantial justification, it grants Defendant's
24 motion to strike. Because the Court finds that the parties have demonstrated compelling reasons,
25 it grants each of the motions to seal.

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1 **I. Discussion.**

2 **A. The Court grants Defendant's motion to strike.**

3 1. Background.

4 Defendant moves to strike one of Plaintiff's expert's reports. (ECF No. 34). Defendant
 5 explains that Plaintiff explicitly stated that it would not be submitting an initial expert report. (*Id.*
 6 at 5). Nonetheless, when Plaintiff offered a rebuttal to Defendant's expert report, Plaintiff's
 7 expert—Kenneth Hollander—provided two reports: a rebuttal (attached to Plaintiff's disclosure
 8 as "Exhibit A") and an affirmative expert report (attached to Plaintiff's disclosure as "Exhibit
 9 B"). (*Id.* at 6). Defendant asserts that the affirmative report is the same in content as an initial
 10 report because it does not rebut or address the topics in Defendant's initial expert report. (*Id.* at
 11 7-8). Defendant points out that the two reports are even titled differently, with Exhibit A being
 12 titled "Rebuttal Report" and Exhibit B being titled "Expert Report." (*Id.*). Defendant explains
 13 that its expert—Brian Sowers—conducted a trademark survey to determine whether Plaintiff's
 14 asserted trademark had achieved distinctiveness from secondary meaning. (*Id.* at 5). Plaintiff's
 15 Exhibit A report criticizes Mr. Sower's secondary meaning survey and report. (*Id.* at 6). But the
 16 Exhibit B report contains an independent consumer survey on likelihood of confusion. (*Id.*).
 17 Because it was late and improperly disclosed, Defendant asks the Court to strike the Exhibit B
 18 report. (*Id.* at 12). If the Court does not, Defendant asserts that it would be prejudiced by having
 19 to produce an expert report to rebut Plaintiff's Exhibit B report, requiring an extension of
 20 discovery deadlines, and requiring the unexpected expenditure of addressing the report. (*Id.* at
 21 10).

22 Plaintiff responds that, because trial has not been set and discovery was (at the time
 23 Plaintiff filed its response¹) still ongoing, Defendant is not harmed by the late disclosure of the
 24 Exhibit B report. (ECF No. 35). Plaintiff makes four arguments. First, that even if Exhibit B is
 25 an untimely affirmative report, striking it is too harsh considering that Defendants can still find a
 26

27 ¹ Discovery closed on December 14, 2022. (ECF No. 31). Dispositive motions were due by
 28 January 13, 2023. (*Id.*).

1 rebuttal expert and question Plaintiff's expert. (*Id.* at 3-5). Plaintiff relies on the five-factor test
2 outlined in *Wendt v. Host International, Inc.*, 1225 F.3d 806, 814 (9th Cir. 1997) to support this
3 argument. (*Id.*). Second, it argues that its rebuttal report was timely provided and thus, the
4 Exhibit B report was timely as well. (*Id.* at 5-6). Third, it argues that the Exhibit B report is not
5 an affirmative report because in it, Mr. Hollander rebuts the methodology Mr. Sowers used. (*Id.*
6 at 6-7). Plaintiff explains that, in its Exhibit A report, Mr. Hollander challenged the survey
7 protocols that Mr. Sowers used. (*Id.*). And in the Exhibit B report, in conducting his own survey,
8 Mr. Hollander applied the correct protocols. (*Id.*). Plaintiff concludes that this means the Exhibit
9 B report is really a rebuttal report. (*Id.*). Finally, Plaintiff argues that Defendant's claims of
10 prejudice and surprise are disingenuous because, even though Plaintiff did not disclose that its
11 expert would enter two reports, it disclosed Mr. Hollander's name and contact information. (*Id.*
12 at 7-8). It concludes that Defendant should have anticipated the report, and because discovery
13 was still open at the time, Defendant could still address the Exhibit B report. (*Id.*).

14 Defendant replies to Plaintiff's first argument that *Wendt* is not only procedurally
15 distinguishable, but it is also not universally accepted as the appropriate test in the Ninth Circuit.
16 (ECF No. 38 at 2-3). But even if the Court were to apply *Wendt*, Defendant asserts that the
17 factors would still support its position that Plaintiff's Exhibit B report is improper. (*Id.* at 3-5).
18 Regarding Plaintiff's second argument, Defendant asserts that the Exhibit B report was not timely
19 just because the rebuttal Exhibit A report was. (*Id.* at 7-10). Defendant argues that the discovery
20 plan and scheduling order provided a sequence for the initial and rebuttal expert deadlines for a
21 reason and Plaintiff should not be rewarded by adopting a "better to ask for forgiveness than
22 permission" approach. (*Id.*). Regarding Plaintiff's third argument, Defendant points out that
23 Plaintiff's report never mentions Mr. Sowers' survey and the survey Mr. Hollander conducted is
24 on a completely different subject than Mr. Sowers'. (*Id.* at 5-7). Regarding Plaintiff's fourth
25 argument, Defendant asserts that it would be prejudiced by having to examine the Exhibit B
26 report, prepare a rebuttal expert report, and enlarge discovery, all without prior notice. (*Id.*).
27 Defendant points out that this would detract from its counsel's available time to prepare
28 dispositive motions. (*Id.*).

1 2. The *Wendt* test.

2 Plaintiff asks the Court to apply the five-factor test the Ninth Circuit applied in *Wendt*
3 requiring a court considering sanctions to analyze: (1) the public’s interest in expeditious
4 resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the
5 party seeking sanctions; (4) the public policy favoring disposition on the merits; and (5) the
6 availability of less drastic sanctions. *Wendt v. Host Intern. Inc.*, 125 F.3d 806, 814 (9th Cir.
7 1997). The Court is not convinced that the *Wendt* test is mandatory in this situation. But even if
8 it were, the factors would weigh in favor of granting Defendant’s motion.

9 Courts in the Ninth Circuit, and even the Ninth Circuit itself, have variably applied the
10 *Wendt* test in determining whether striking an expert is appropriate. *Compare Wendt*, 125 F.3d at
11 814 *with Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1105-1107 (9th Cir.
12 2001); *compare CCR/AG Showcase Phase I Owner, L.L.C. v. United Artists Theatre Circuit, Inc.*,
13 No. 2:08-cv-00984-RCJ-GWF, 2010 WL 1947016, at *8 (D. Nev. May 13, 2010) *with Campbell*
14 *v. Garcia*, No. 3:13-cv-00627-LRH-WGC, 2015 WL 995244, at *2-5 (D. Nev. Mar. 6, 2015).
15 However, the case to which the *Wendt* court cited for the test—*Wanderer v. Johnston*, 910 F.2d
16 652 (9th Cir. 1990)—addressed it as appropriate for “the district court to apply in considering
17 whether a *dismissal* of default is appropriate as a Rule 37 sanction.” *Wanderer*, 910 F.2d at 656
18 (emphasis added). And from the cases to which the *Wanderer* court cites, it appears that the
19 Ninth Circuit intended courts to apply the test when considering dismissal. *See, e.g., Malone v.*
20 *U.S. Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987) (“[a] district court must weigh five factors
21 in determining whether to *dismiss* a case for failure to comply with a court order...” (emphasis
22 added); *see Thompson v. Housing Authority of City of Los Angeles*, 782 F.2d 829, 831 (9th Cir.
23 1986) (“because *dismissal* is such a severe remedy, we have allowed its imposition in these
24 circumstances only after requiring the district court to weigh several factors...” (emphasis
25 added). And when applying the test in *Wendt*, the Ninth Circuit did not address whether it
26 considered the district court’s sanctions precluding an expert disclosure to be dispositive. *See*
27 *Wendt*, 125 F.3d at 814.

1 But even if the *Wendt* test is applicable here, the Court finds that it weighs in favor of
2 granting Defendant's motion. First, the public's interest in the expeditious resolution of litigation
3 weighs in favor of granting Defendant's motion. If the Court were to deny Defendant's motion,
4 Defendant would need additional time to designate a rebuttal expert witness and for that witness
5 to address Mr. Hollander's report. But discovery has already closed and the parties have not
6 moved to extend it. Additionally, it appears that Defendant previously agreed to extend time
7 under the impression that Plaintiff would not disclose an initial expert witness. (ECF No. 31 at 3)
8 ("Plaintiff requires additional time to obtain a *rebuttal* report from an expert prior to the current
9 *rebuttal* expert deadline...Both parties are likely to depose the named experts and any rebuttal
10 experts.") (emphasis added).

11 The second factor—the Court's need to manage its docket—weighs in favor of granting
12 Defendant's motion for similar reasons. Discovery closed in December and the parties' pretrial
13 order will be due thirty days after a decision on their currently-pending dispositive motions.
14 Reopening discovery at this stage could impact the dispositive motions and hinder the efficient
15 progression of this case.

16 The third factor—the risk of prejudice to the party seeking sanctions—also weighs in
17 favor of granting Defendant's motion. Defendant has explained that the prejudice it would face
18 involves having to extend discovery, designating a rebuttal expert, and addressing an opinion that
19 Plaintiff explicitly stated it would not have to. Additionally, Defendant will have to expend
20 additional attorneys' fees and witness fees to do these things. Instead of addressing these issues,
21 Plaintiff simply asserts that Defendant faces "no risk of prejudice." (ECF No. 35 at 4).
22 Defendant has the better argument.

23 Fourth, while the public policy favoring disposition of cases on their merits inherently
24 weighs in favor of denying Defendant's motion, Plaintiff has provided no reason why it should
25 weigh heavily in that direction. Plaintiff has not developed its argument that striking Dr.
26 Hollander's report would result in the preclusion of any of its claims or defenses. Instead, it
27 argues in conclusory fashion that "[i]t would be inequitable and contrary to public policy to allow
28 Defendant to avoid liability for its infringement based on a technicality." (ECF No. 35 at 5).

1 This is not sufficient to establish that the survey Dr. Hollander conducted in the Exhibit B report
 2 is detrimental to Plaintiff's case. Presumably, if it were detrimental, Plaintiff would have
 3 anticipated the need to conduct this survey and disclose it as an initial report.

4 Fifth, while lesser sanctions are potentially available, Plaintiff's argument regarding what
 5 those lesser sanctions might be is not persuasive. Plaintiff asserts that no sanctions are warranted
 6 "given Plaintiff's timely disclosure of Hollander's written reports..." (ECF No. 35 at 5).
 7 Plaintiff suggests that in the event the Court is inclined to grant sanctions, the "Court can fashion
 8 an adequate remedy to allow Defendant the opportunity to address those opinions." (*Id.*). In
 9 other words, Plaintiff suggests an extension of time to be the appropriate sanction. But
 10 Defendant's argument is more persuasive. It points out that extending the discovery schedule is
 11 no sanction at all and that the sanction it seeks—precluding the Exhibit B report—"simply holds
 12 Plaintiff to the deliberate choice that it made...not to offer expert testimony or a survey in support
 13 of its trademark infringement claims." (ECF No. 38 at 4). The *Wendt* factors weigh in favor of
 14 granting Defendant's motion.

15 3. Harmlessness and substantial justification.

16 Even if the Court did not apply the *Wendt* factors, Plaintiff has still failed to demonstrate
 17 harmlessness or substantial justification sufficient to avoid the sanction of precluding the Exhibit
 18 B report. Federal Rule of Civil Procedure 26 requires parties to disclose the identity of any
 19 person who may be used as an expert witness. Fed. R. Civ. P. 26(a)(2). Rebuttal expert reports
 20 are proper if they contradict or rebut the subject matter of the affirmative expert report.
 21 *Campbell*, 2015 WL 995244, at *2. They are not the proper place for presenting new arguments.
 22 *Id.* Federal Rule of Civil Procedure 26(a)(2)(D)(ii) provides that a party must make expert and
 23 rebuttal expert disclosures in the sequence that the court orders.

24 Federal Rule of Civil Procedure 37 authorizes sanctions for a party's failure to make
 25 disclosures or cooperate in discovery. Fed. R. Civ. P. 37. Under Rule 37(c)(1), "[i]f a party
 26 failed to...identify a witness as required by Rule 26(a)...the party is not allowed to use that
 27 information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure
 28 was *substantially justified or is harmless.*" Fed. R. Civ. P. 37(c)(1) (emphasis added). The

1 burden is on the party facing discovery sanctions under Rule 37(c)(1) to prove substantial
2 justification and harmlessness. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir.
3 2008). The severity and degree of a sanction under Rule 37(c)(1) is up to the discretion of the
4 district court. *See Gilbert v. Spirit Airlines*, No. 2:12-cv-00930-JCM-PAL, 2013 WL 5718895, at
5 *2 (D. Nev. Oct. 18, 2013) (citing *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir.
6 1985) and *Keener v. United States*, 181 F.R.D. 639, 641 (D. Mont. 1998)). Exclusion of an
7 expert's testimony for failure to comply with the requirements of Rule 26(a) is a sanction
8 available to the trial court within its wide discretion under Rule 37(c)(1) even in the absence of
9 bad faith or willfulness. *Gilbert*, 2013 WL 5718895, at *3 (citing *Yeti by Molly Ltd. v. Dekcers*
10 *Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)).

11 Plaintiff's disclosure of the Exhibit B report was untimely in violation of Rule 26(a). But
12 Plaintiff has not demonstrated substantial justification or harmlessness under Rule 37(c). As a
13 preliminary matter, the Court is not convinced by Plaintiff's arguments that Mr. Hollander's
14 Exhibit B report was timely or a rebuttal. Mr. Hollander's Exhibit B report did not contradict the
15 subject matter of Mr. Sowers.' And Plaintiff's argument that the report was a rebuttal because it
16 used the correct protocols *on a different subject* is unconvincing. Because it was not a rebuttal
17 report, the Exhibit B report, disclosed well after the initial expert report deadline, was untimely.

18 The remainder of Plaintiff's arguments focus on harmlessness, but do not address
19 substantial justification. Plaintiff's harmlessness arguments are less persuasive than Defendant's
20 arguments that it would be prejudiced by having to address Plaintiff's Exhibit B report. Plaintiff
21 asserts that the report is harmless because discovery had not yet closed at the time the parties filed
22 their briefs and because Defendant already knew Mr. Hollander's identity and qualifications, even
23 if it did not know the substance of his Exhibit B report. However, discovery closed in December
24 and the parties have not moved to extend it further. (ECF No. 31). Additionally, Defendant's
25 arguments that it will have to incur substantial unexpected expenses in having its expert analyze
26 the Exhibit B report, prepare a rebuttal report, and to extend the discovery deadlines to
27 accommodate that analysis are persuasive.
28

Moreover, Plaintiff does not address substantial justification at all. It does not explain why it did not disclose the Exhibit B report sooner or why it specifically stated that it would not submit an initial report at all and then changed course. Given Plaintiff's contradicting behavior—claiming it would not disclose an initial expert and then disclosing the Exhibit B report late—the Court does not find that Plaintiff's late disclosure was substantially justified.

The Court finds that Plaintiff has violated its requirement to make initial expert disclosures. And Plaintiff has failed to demonstrate harmlessness or substantial justification. The Court will thus grant Defendant's motion to strike. Plaintiff shall not be permitted to introduce the Exhibit B report at trial, in a hearing, or in support of or opposition to any motion.

B. The Court grants each of the motions to seal.

A party seeking to file a confidential document under seal must file a motion to seal and must comply with the Ninth Circuit's directives in *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006) and *Ctr. for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092 (9th Cir. 2016). A party seeking to seal judicial records attached to motions more than tangentially related to the merits of the case must meet the "compelling reasons" standard. *See Kamakana*, 447 F.3d at 1183; *Ctr. for Auto Safety*, 809 F.3d at 1101. Under that standard, "a court may seal records only when it finds 'a compelling reason and articulate[s] the factual basis for its ruling, without relying on hypothesis or conjecture.'" *Ctr. for Auto Safety*, 809 F.3d at 1097 (quoting *Kamakana*, 447 F.3d at 1179). That a party has designated a document as confidential under a protective order does not, standing alone, establish sufficient grounds to seal a filed document. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1133, 38 (9th Cir. 2003); *see also Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992).

1. Defendant's motion to seal (ECF No. 43).

Defendant moves to seal two exhibits to its opposition to Plaintiff's motion for summary judgment. (ECF No. 43). It explains that it is sealing the documents—an email between Plaintiff and a customer and a text between Plaintiff and a customer—because Plaintiff designated them confidential under the parties' protective order. (*Id.*). Plaintiff responds that compelling reasons exist to seal the documents because they contain customer names and contact information. (ECF

1 No. 49). Plaintiff explains that the parties to the case are competitors, and each side has taken
2 steps to protect competitive information from each other and from outside competitors. (*Id.*). It
3 adds that it would be prejudiced in future pricing and contract negotiations with customers and
4 suppliers if this type of pricing and sales information were public. (*Id.*). The Court finds that
5 Plaintiff has met its burden of demonstrating compelling reasons to seal these documents. It thus
6 grants Defendant's motion to seal.

7 2. Plaintiff's motion to seal (ECF No. 46).

8 Plaintiff moves to seal Exhibits 4, 21, 24, and 25 to its opposition to Defendant's motion
9 for summary judgment and to redact a portion of that opposition. (ECF No. 46). Exhibit 4 is the
10 deposition of Plaintiff's 30(b)(6) witness, which Plaintiff has deemed proprietary, commercially
11 sensitive information about its operations, sales, marketing, and pricing. (*Id.*). Exhibit 21 is a
12 deposition of a third party, which "was marked confidential during the deposition because the
13 deponent has an unrelated ongoing litigation case with the Defendant." (*Id.*). Exhibit 24 includes
14 two of Plaintiff's invoices showing its sales price and specific customers. (*Id.*). And Exhibit 25
15 includes Defendant's profit and loss statements, containing Defendant's competitively sensitive
16 information. (*Id.*).

17 Defendant responds only to point out that the third party who designated the deposition in
18 Exhibit 21 confidential has since determined that the confidential designation is no longer
19 necessary. (ECF No. 47). Otherwise, Defendant does not oppose the motion to seal. (*Id.*).
20 Plaintiff replies and limits its request to Exhibits 4, 24, and 25 and the redaction of its opposition.
21 (ECF No. 48).

22 The Court finds that the parties have demonstrated compelling reasons to seal these
23 documents. As Plaintiff points out, the documents contain both sides' competitive business and
24 financial information. The Court thus grants in part and denies in part Plaintiff's motion to seal.
25 The Court grants Plaintiff's request to file under seal the unredacted version of its opposition
26 along with Exhibits 4, 24, and 25. It denies Plaintiff's request to seal Exhibit 21. Because
27 Plaintiff has not yet done so, Plaintiff must file the remainder of its opposition and exhibits on the
28 docket.

1 3. Defendant's motion to seal (ECF No. 53).

2 Defendant moves to seal two exhibits to its reply in support of its motion for summary
3 judgment. (ECF No. 53). It explains that Plaintiff designated the exhibits confidential under the
4 parties' protective order. (*Id.*). Plaintiff responds that the exhibits—a copy of the terms
5 agreement between Plaintiff and a turf distributor and portions of Plaintiff's 30(b)(6)
6 deposition—contain competitively sensitive information. (ECF No. 57). It adds that it would be
7 harmed to the advantage of competitors if this information were public. (*Id.*). The Court finds
8 that Plaintiff has demonstrated compelling reasons to seal these documents. It therefore grants
9 the motion to seal.

10 4. Plaintiff's motion to seal (ECF No. 55).

11 Plaintiff moves to seal Exhibits 4, 21-30, 36-37, and 39 to its reply in support of its
12 motion for summary judgment. (ECF No. 55). It also seeks to redact portions of its reply
13 discussing those documents. (*Id.*). It explains that portions of Exhibits 4 and 25 are excerpts
14 from its 30(b)(6) deposition discussing proprietary and competitively sensitive information,
15 including some information marked "attorneys' eyes only" about its operation, sales, marketing,
16 and pricing. (*Id.*). Portions of Exhibit 21 contain similar testimony from a 30(b)(6) witness, also
17 marked "attorneys' eyes only." (*Id.*). Exhibits 22, 24, 26, and 36 are invoices from Plaintiff to
18 specific customers which have customer addresses, names, and pricing. (*Id.*). Exhibit 23
19 includes Plaintiff's website analytics marked "attorneys' eyes only" because it contains sensitive
20 information about Plaintiff's strategies. (*Id.*). Exhibit 27 and 37 are texts between Plaintiff and
21 its customers, which contain pricing and customer information. (*Id.*). Exhibit 28 is a customer's
22 application for financing, which contains the customer's private information like social security
23 number and date of birth. (*Id.*). Exhibit 29 is a declaration describing an advertisement and
24 attaching that advertisement that contains pricing and strategy information. (*Id.*). Exhibit 30 is
25 Defendant's profit and loss statement containing private business information. (*Id.*). And Exhibit
26 39 includes emails between Plaintiff and one of its customers, which contains customer and
27 strategy information. (*Id.*).
28

1 The Court finds that Plaintiff has demonstrated compelling reasons to seal the exhibits and
2 portions of its reply. It thus grants the motion. Because Plaintiff has not yet done so, the Court
3 will require Plaintiff to file the remainder of its reply and exhibits on the docket.

4
5 **IT IS THEREFORE ORDERED** that Defendant's motion to strike (ECF No. 34) is
6 **granted.** Plaintiff shall not introduce the Exhibit B report at trial, in a hearing, or in support of or
7 opposition to any motion.


8 **IT IS FURTHER ORDERED** that Defendant's motion to seal (ECF No. 43) is **granted.**

9 **IT IS FURTHER ORDERED** that Plaintiff's motion to seal (ECF No. 46) is **granted in**
10 **part and denied in part.** It is granted to the extent that Plaintiff may keep Exhibits 4, 24, and 25
11 and its unredacted opposition under seal. It is denied to the extent that Plaintiff may not keep
12 Exhibit 21 under seal. Plaintiff must file the remainder of the exhibits to its opposition, along
13 with the redacted version of the opposition, on the public docket.

14 **IT IS FURTHER ORDERED** that Defendant's motion to seal (ECF No. 53) is **granted.**

15 **IT IS FURTHER ORDERED** that Plaintiff's motion to seal (ECF No. 55) is **granted.**
16 Plaintiff may keep the referenced exhibits, portions of exhibits, and its unredacted reply under
17 seal. Plaintiff must file the remainder of the exhibits to its reply, the redacted version of exhibits
18 for which Plaintiff only sought to seal portions, and the redacted version of its reply on the public
19 docket.

20
21 DATED: March 23, 2023

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24 DANIEL J. ALBRECHTS
25 UNITED STATES MAGISTRATE JUDGE
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